Material Tensions between Natural Law and Positive Law and Approaches to its Solution

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Abstract

The title of my dissertation – "Material Tensions between Natural Law and Positive Law and Approaches to its Solution" – refers to everlasting contrapositions of two different approaches to law: (i) natural law tradition which is concerned with a necessary continuity between law and the requirements of practical reasonableness and that describes law as "rational standard for conduct"[1] and (ii) tradition of legal positivism, which understands law only as a social fact.

Actually, in the world of jurisprudence, there is no single natural law theory on one side[2] and unique legal positivism on the other side.[3] It is

[1] MURPHY, Mark C. Natural Law Jurisprudence. *Legal Theory*. 2003, No. 9, p. 244, MURPHY, Mark C. Natural Law Theory. In: GOLDING , Martin P., EDMUNSON, William A. (eds.). *The Blackwell Guide to the Philosophy of Law and Legal Theory*. s.l. : Blackwell Publishing, 2006, p. 15.

[2] For many of them we can mention *classical natural law theory* of the thomistic philosophy, *new natural law theory* of G. Grisez and J. Finnes, *legal realism* of J. Hervada, "modern" natural law theories such as L. Fuller's concept of the Rule of Law and the inner morality of law or R. Dworkin's theory of the unique right answer based on legal principles. Cf. FINNIS, John. Natural Law : The Classical Tradition. In: COLEMAN, Jules, SHAPIRO, Scott (eds.). *The Oxford Handbook of Jurisprudence and Philosophy of Law.* Oxford : Oxford University Press, 2002, p. 1–60 and BIX, Brian H. Natural Law : The Modern Tradition. In: COLEMAN, Jules, SHAPIRO, Scott (eds.). *The Oxford Handbook of Jurisprudence and Philosophy of Law.* Oxford : Oxford University Press, 2002, p. 61–103. In continental jurisprudence we can find different natural law approaches of G. Radbruch, S. Kafuman, M. Kriele, R. Dreier, A. Verdross and R. Alexy. Cf. HOLLÄNDER, Pavel. *Filosofie práva.* Plzeň : Aleš Čeněk, 2006, p. 18.

[3] In Czech jurisprudence many theories of legal positivistic tradition were described at large in works of T. Sobek. Cf. SOBEK, Tomáš. *Argumenty teorie práva.* Praha : Ústav státu

better to speak about different theories in the frame of the tradition of legal positivism or in the frame of the tradition of natural law thinking.[4]

For this reason, the dissertation does not offer any general theory of "positivism–natural law" tensions and limits itself to presentation of two important theories of naturalistic tradition: New Natural Law theory of John Finnis and legal theory of Robert Alexy.

New Natural Law theory (sometimes also called the New Classical Natural Law theory) is based on new interpretation of Aquinas, which was introduced by G. Grisez in 1965[5] and for the jurisprudence revealed by J. Finnis.[6] This theory understands natural law thinking as "reflective critical accounts of the constitutive aspects of the well-being and fulfillment of human persons and the communities they form".[7] The distinctive areas of interest of the New Natural Law theory are not only jurisprudential topics, but also the foundations of moral thought and practical reason (and practical reasonableness), the nature of human actions, the nature of political authority, the political common good or the ultimate end of human beings.[8]

The dissertation presents two key jurisprudential topics resolved by the New Natural Law: derivation of positive law and *lex iniusta non est lex* thesis. The New Natural Law theory states that positive law is derived from

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a práva, 2008, SOBEK, Tomáš. *Nemorální právo.* Praha : Ústav státu a práva, 2010 and SOBEK, Tomáš. *Právní myšlení. Kritika moralismu.* Praha : Ústav státu a práva, 2011.

[4] Cf. RAZ, Joseph. *The Authority of Law. Essays on Law and Morality.* 2nd ed. Oxford : Oxford University Press, 2009, p. 319.

[5] Cf. GRISEZ, Germain G. The First Principal of Practical Reason: A Commentary on the Summa Theologiae, 1–2, Question 94, Article 2. *Natural Law Forum.* 1965, vol. 10, p. 168–201.

[6] FINNIS, John. *Natural Law and Natural Rights.* Oxford : Oxford University Press, 1980.

[7] GEORGE, Robert P. Natural Law. *Harvard Journal of Law and Public Policy*. 2008, vol. 31, no. 1, p. 172.

[8] TOLLEFSEN, Christopher. The New Natural Law Theory. *Lyceum.* Vol. X, no. 1, p. 1.

natural law in two different types of derivation corresponding to different types of law: direct (deductive) "translation" and indirect *determinatio*.[9]

Regarding *lex iniusta* we present weak reading based on Finnis's *focal sense* of law.[10] According to Finnis to say that unjust laws are not laws at all is self-contradictory statement. The *lex iniusta* thesis only says, that some law is law in the focal sense, whereas some law (unjust law) is law in a secondary, peripheral sense.[11] Although it seems that such a statement could be compatible with legal positivism, we do not agree. At least, the weak natural law thesis is contrary to the spirit of legal positivism: "For if the weak natural thesis is true, it follows that one cannot have a complete descriptive theory of law without having a complete understanding of the requirements of practical reasonableness."[12]

Robert Alexy is a representative of "modern" natural law thinking. He describes himself as *inclusive non-positivist*.[13] He defends thesis, that law has two dimensions – real and ideal – and follows Radbruch formula[14] in stating that "extreme injustice is no law" (so called "argument from injustice").[15] His concept of law also contains the "argument from correctness", which says that law claims to be morally correct, and

[9] GEORGE, Robert P. Natural Law. *Harvard Journal of Law and Public Policy*. 2008, vol. 31, no. 1, p. 188.

[10] FINNIS, John. *Natural Law and Natural Rights.* Oxford : Oxford University Press, 1980, p. 365.

[11] FINNIS, John. *Natural Law and Natural Rights.* Oxford : Oxford University Press, 1980, p. 364.

[12] MURPHY, Mark C. Natural Law Jurisprudence. *Legal Theory*. 2003, No. 9, p. 263.

[13] ALEXY, Robert. Law, Morality, and the Existence of Human Rights. *Ratio Juris.* 2012, Vol. 25, No. 1, p. 6.

[14] RADBRUCH, Gustav. Zákonné neprávo a nadzákonné právo. In: HANUŠ, Libor. Gustav Radbruch – o napětí mezi spravedlností a právní jistotou. *Právní rozhledy.* 2009, č. 16, p. 579–585.

[15] ALEXY, Robert. Law, Morality, and the Existence of Human Rights. *Ratio Juris.* 2012, Vol. 25, No. 1, p. 7. For details see ALEXY, Robert. *An Answer to Joseph Raz*. In: PAVLAKOS, George. *Law, Rights and Discourcse : The Legal Philosophy of Robert Alexy.* Oxfor : Hart Publishing, 2007, p. 37–55.

“argument from principles”, which holds that all legal systems necessarily comprise legal principles. Those three arguments form basis of his criticism of legal positivism.

We present Alexy’s theory on the background of his polemic with Joseph Raz. The Raz–Alexy discussion is unique: the proponents of the discussion comes from different legal cultures.

The dissertation also deals with *human rights* and represents attitudes of R. Alexy and New Natural Law to this topic. Although the *idea* of human rights seems to be widely shared, there are many contradictory approaches to them. Alexy defends human rights as moral elements which are universal, fundamental, abstract and have priority over all other norms. He defends its objectivity and justifiability which is based on “explicative-existential” argument which stems from his theory of legal discourse. Alexy explicitly rejects religious, intuitionistic, consensual, biological and instrumental approach to human rights.

In last chapter we present consequences of natural law thinking on concrete social topic, which is religious neutrality of the state. We present argumentation based on New Natural Law theory which comes to the end, that although the state and religion should be in many ways separated and neutral, this does not forbid to the state some kind of promoting religion.